Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

some aspects of medical treatment and criminal law

28

Canada

Reports and Working Papers of the Law Reform Commission of Canada

Reports to Parliament

1. *Evidence* (December 19, 1975)
2. *Guidelines — Dispositions and Sentences in the Criminal Process** (February 6, 1976)
3. *Our Criminal Law* (March 25, 1976)
4. *Expropriation** (April 8, 1976)
5. *Mental Disorder in the Criminal Process** (April 13, 1976)
6. *Family Law** (May 4, 1976)
7. *Sunday Observance** (May 19, 1976)
8. *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada** (December 19, 1977)
9. *Criminal Procedure — Part I: Miscellaneous Amendments** (February 23, 1978)
10. *Sexual Offences** (November 29, 1978)
11. *The Cheque: Some Modernization** (March 8, 1979)
12. *Theft and Fraud** (March 16, 1979)
13. *Advisory and Investigatory Commissions** (April 8, 1980)
14. *Judicial Review and the Federal Court** (April 25, 1980)
15. *Criteria for the Determination of Death** (April 8, 1981)
16. *The Jury* (July 28, 1982)
17. *Contempt of Court** (August 18, 1982)
18. *Obtaining Reasons before Applying for Judicial Scrutiny — Immigration Appeal Board* (December 16, 1982)
19. *Writs of Assistance and Telewarrants* (July 22, 1983)
20. *Euthanasia, Aiding Suicide and Cessation of Treatment** (October 11, 1983)
21. *Investigative Tests: Alcohol, Drugs and Driving Offences** (November 10, 1983)
22. *Disclosure by the Prosecution* (June 15, 1984)
23. *Questioning Suspects* (November 19, 1984)
24. *Search and Seizure* (March 22, 1985)
25. *Obtaining Forensic Evidence* (June 12, 1985)
26. *Independent Administrative Agencies* (October 23, 1985)
27. *Disposition of Seized Property* (April 24,1986)

Working Papers

1. *The Family Court** (1974)
2. *The Meaning of Guilt: Strict Liability** (1974)
3. *The Principles of Sentencing and Dispositions** (1974)
4. *Discovery** (1974)
5. *Restitution and Compensation** (1974)
6. *Fines** (1974)
7. *Diversion** (1975)
8. *Family Property** (1975)
9. *Expropriation** (1975)
10. *Limits of Criminal Law: Obscenity: A Test Case* (1975)
11. *Imprisonment and Release** (1975)
12. *Maintenance on Divorce** (1975)
13. *Divorce** (1975)
14. *The Criminal Process and Mental Disorder** (1975)
15. *Criminal Procedure: Control of the Process** (1975)
16. *Criminal Responsibility for Group Action** (1976)
17. *Commissions of Inquiry: A New Act** (1977)
18. *Federal Court: Judicial Review** (1977)
19. *Theft and Fraud: Offences* (1977)
20. *Contempt of Court: Offences against the Administration of Justice* (1977)
21. *Payment by Credit Transfer* (1978)
22. *Sexual Offences** (1978)
23. *Criteria for the Determination of Death** (1979)
24. *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons* (1979)
25. *Independent Administrative Agencies** (1980)
26. *Medical Treatment and Criminal Law* (1980)
27. *The Jury in Criminal Trials** (1980)
28. *Euthanasia, Aiding Suicide and Cessation of Treatment** (1982)
29. *The General Part: Liability and Defences* (1982)
30. *Police Powers: Search and Seizure in Criminal Law Enforcement** (1983)
31. *Damage to Property: Vandalism* (1984)
32. *Questioning Suspects* (1984)
33. *Homicide* (1984)
34. *Investigative Tests* (1984)
35. *Defamatory Libel* (1984)
36. *Damage to Property: Arson* (1984)
37. *Extraterritorial Jurisdiction* (1984)
38. *Assault* (1985)
39. *Post-seizure Procedures* (1985)
40. *The Legal Status of the Federal Administration* (1985)
41. *Arrest* (1985)
42. *Bigamy* (1985)
43. *Behaviour Alteration and the Criminal Law* (1985)
44. *Crimes against the Environment* (1985)
45. *Secondary Liability* (1985)
46. *Omissions, Negligence and Endangering* (1985)
47. *Electronic Surveillance* (1986)
48. *Criminal Intrusion* (1986)
49. *Crimes against the State* (1986)

The Commission has also published over seventy Study Papers on various aspects of law. If you wish a copy of our catalogue of publications, please write to: Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario K1A 0L6, or Suite 310, Place du Canada, Montréal, Québec, H3B 2N2.

* Out of print. Available in many libraries.

REPORT 28

SOME ASPECTS OF MEDICAL TREATMENT AND CRIMINAL LAW

March, 1986

The Honourable John Crosbie, P.C., Q.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on medical treatment and criminal law.

Yours respectfully,

Allen M. Linden
President

Gilles Létourneau
Vice-President

Louise Lemelin, Q.C.
Commissioner

Joseph Maingot, Q.C.
Commissioner

John Frecker
Commissioner

Commission

Mr. Justice Allen M. Linden, President
Mr. Gilles Létourneau, Vice-President
Ms. Louise Lemelin, Q.C., Commissioner
Mr. Joseph Maingot, Q.C., Commissioner
Mr. John Frecker, Commissioner

Acting Secretary

François Handfield, B.A., LL.L.

Co-ordinator, Protection of Life Project

Edward W. Keyserlingk, B.A., B.Th., L.Th., L.S.S., LL.M., Ph.D.

Principal Researcher

Jean-Louis Baudouin, Q.C., B.A., B.C.L., D.J., D.E.S.

Table of Contents

Introduction

For several years the Law Reform Commission has published a series of Study Papers, Working Papers and Reports to Parliament regarding certain aspects of protecting the human person. Among these, in the field of medical law, is a group of studies produced by the Protection of Life Project. The Commission has thus been able to make proposals for reform affecting the criteria for the determination of death, sterilization of the mentally retarded, medical treatment, euthanasia, suicide, interruption of treatment and techniques for controlling and altering personality, and will soon be doing so for experimentation on human subjects. It has also published two key general studies, one on the sanctity of life and the other on consent to medical care.

Besides these general studies, intended for a wide readership, there are other Papers of a more strictly legal nature, directly affecting the criminal law as such. An example of these is Working Paper 29, entitled *The General Part: Liability and Defences*, which contains a group of principles which can also apply to protection of the human person. Finally, the Commission has undertaken other studies on offences against the person, strictly speaking, such as homicide and assault.

This group of studies has led to much consultation among various groups of legal, medical and other experts. It has also generated public reaction, giving the Commission the benefit of relevant comments, criticisms and observations. This reaction has made an invaluable contribution to the Commission's analysis. In many cases it has enabled the Commission to adjust certain new approaches, such as changing, in a Report to Parliament, certain recommendations made in the Working Paper on the same subject. It has in addition shown the Commission the extent to which reform is necessary, and even urgent, in certain areas.

Among the objectives of the Commission since its inception is one which has now become a priority: reforming the criminal law, and in particular an in-depth revision of the present *Criminal Code*. The Commission is now devoting the larger part of its energy to this undertaking so that Canada will have a modern Criminal Code, responding to the needs of the late twentieth century and adequately expressing the social aspirations and demands of Canadian citizens.

In terms of this undertaking the protection of the person is clearly of special importance and a priority. The principal body of offences in this area at the present time is contained in Part VI of the *Criminal Code*. These must therefore be subjected to a critical review in light of changes in social mores and the problems which the existing provisions have created in the courts.

However, in such an important area it is essential to attempt to formulate a general policy. Owing to the speed of scientific development, protection of the person in the field of medical law presents special problems which affect the daily lives of everyone. In view of these two factors, the Commission has thought it advisable to produce a general Paper with two specific objectives. The first is to bring together the various recommendations scattered among the Protection of Life Project Papers written to date. The second is to achieve a systematic and organized presentation of a group of recommendations to which the drafters of the new Criminal Code can refer.

This Paper is not limited to recommendations which can be converted directly into legislation, though these comprise by far the most important part of it. The many studies which the Commission has undertaken on the matter have indicated the existence of two important factors upon which reform will to some extent depend. First, the protection which the law gives, or should give, to the person forms a complex whole which is not based exclusively on the criminal law. The guarantees made in the Constitution, the federal or provincial Charters, protection by private law and at times by administrative law, all play an important part. The protection given by the criminal law must therefore take these other provisions into account and so far as possible be in harmony with them. It is for this reason that, in several of its Papers, the Commission has from time to time made suggestions on general legal policy and advocated better co-ordination between federal and provincial law. This was the case in particular in Working Paper 24 on the question of the sterilization of the mentally handicapped and Working Paper 43 on behaviour alteration and the criminal law.

Furthermore, real reform sometimes occurs more through the changing of individual or group attitudes, behaviour and conduct than by the drafting of legislation, especially in the case of the criminal law. The desired changes may be achieved only if government has a coherent policy in this regard. This policy does not necessarily have to be contained in criminal legislation: it may simply be in rules of internal administration. The Commission has many times had to make this kind of suggestion, both in connection with the Protection of Life Project and in its Administrative Law Project. This Paper was therefore conceived and written with this in mind.

Before examining the main problems which any reform should attempt to resolve, one must relate that inquiry to a more general context, in this case the role of the criminal law as an intervening force.

The Canadian legislative and judicial corpus indicates that there are several levels of intervention affecting the legal protection of the integrity of the human person. First, there are the provisions of the *Canadian Charter of Rights and Freedoms* and the interpretations that these may be given by the courts. In the same category we can put the various provincial enactments, such as the Québec *Charter of Human Rights and Freedoms*, which also seek to protect the person from the standpoint of public law.

Private law, whether in the civil or common law tradition, has also developed several techniques to protect and preserve the integrity of the person. Thus, private law provides the victim of an injury caused by the fault or negligence of another a remedy in the form of monetary compensation for the damage suffered. Some statutes also give the individual greater protection in particular areas. This is true, for example, in the case of experimentation and the sterilization of persons who are mentally handicapped.

The criminal law intervenes on a third level. Without wishing to undertake a philosophical analysis of its role here, it will suffice for us to note that the prevention of crime is among the functions it is required to perform. The criminal law exists to stigmatize publicly certain antisocial acts. On the other hand, not every act of this nature necessarily has a criminal penalty attached to it. The objectionable conduct must also have a certain degree of gravity and seriousness to warrant this kind of prohibition.

No exception is made to this general rule where protection of the integrity of the person is concerned. Though such integrity is recognized by the law as a fundamental value, every invasion of it cannot and should not necessarily constitute a criminal offence. Thus, if the intrusion causes the victim's death, the perpetrator will be held liable only if the act committed constitutes a homicide within the meaning of the law or negligence which, through the reckless or careless behaviour of the perpetrator, can be classified as "criminal negligence." If these conditions are not met, as for example when there has simply been an "accident" in the popular sense, the criminal law leaves to private law the task of determining whether monetary compensation is appropriate. It does not publicly stigmatize the wrongful conduct. There is thus an appreciable difference between criminal negligence and civil fault, depending on the nature and type of action by the perpetrator, and this clearly illustrates the special functions of these two areas of the law.

This difference is fully confirmed by the facts when applied to the specific context of medical law. The case reports are full of court decisions holding a physician liable in damages to his patient as the result of a mistake or fault in diagnosis or treatment. On the other hand, cases in which a charge of homicide, criminal negligence or assault has been laid against medical personnel are rare, and those in which a conviction was obtained are rarer still.

This general statement of the function of the criminal law leads to certain important conclusions. First, the revised criminal law should not be expected to govern all invasions of the integrity of the person. Only those of such gravity and seriouness that they merit a public sanction should be "criminalized." Second, and this is the point of special significance in medical care situations, the criminal law should not be expected to regulate in advance, in minute detail, the entire system of protection for the patient's rights. Criminal law may lay down certain prohibitions and attach penalties to them: it cannot, like a regulatory statute, specify detailed terms and conditions or even regulate the application of such protection.

Thirdly, though medical law may result in a special type of intrusion, it is not unique in doing so. As the rules of the criminal law are stated in general form, and in language expressing principles of universal application, most of the problems which arise in the field of medical law can be regulated by those general provisions applicable to all other cases of illegitimate violation of the integrity of the person. If the need arises, a specific provision may become necessary to cover a situation peculiar to medical science.

In conclusion, therefore, the criminal law should not be expected either to completely regulate protection of the integrity of the person, or to provide an answer to all problems.

CHAPTER ONE

Outline of Reform

As indicated in the various Papers published by the Commission to date on the subject as a whole, reform affecting protection of the integrity of the person turns on a number of basic questions that must be briefly reviewed and examined here.

Some of these involve fundamental matters (Is the right to consent to what would ordinarily be an assault legitimate?); others problems of legal analysis (Should the idea that treatment is *prima facie* an assault be preserved?); and still others specific rules (Should aiding suicide be criminalized?). To provide a coherent overview of the question and attempt to impose at least a semblance of logic in a very disparate whole, we thought it advisable to group our observations under three main principles, which we feel should govern all aspects of the reform, namely:

(1) maintaining the principle of protection of life and health;

(2) maintaining the principle of the autonomy of the person;

(3) maintaining the principle of the person's right to self-determination.

I. Maintaining the Principle of Protection of Life and Health

By a series of offences, the present criminal law seeks to protect human life and health. These various provisions have been analysed in detail in Working Paper 26, *Medical Treatment and Criminal Law*. As that Working Paper showed, this protection centres primarily on the offences of assault (*Criminal Code*, ss. 244, 245), failure to fulfil a duty to provide necessaries (s. 197), failure to fulfil a duty imposed on those who undertake acts dangerous to life (ss. 198, 199), intentionally causing bodily harm (s. 228), criminal negligence (ss. 202-204) and homicide (ss. 204-223). These provisions are general in application and so naturally also cover acts committed in a context other than the medical one.

The criminal law must continue to ensure that the individual has such protection. Life and health must continue to be recognized as fundamental values which are worthy of protection. From the standpoint of reform, however, three questions need to be asked.

(1) Should the law also protect the mental or psychological integrity of the person by criminalizing violations of it?

(2) Are the current general standards determining what conduct by medical personnel is acceptable for purposes of the criminal law adequate?

(3) How should the criminal law treat cases where palliative care is administered when that treatment may result in shortening the patient's life?

A. The Protection of Psychological Integrity

This very complex problem was discussed at length in Working Paper 43, entitled *Behaviour Alteration and the Criminal Law*. The Commission observed in that Paper that the present law only protects the psychological integrity or health of an individual in an indirect and piecemeal way. Various possible solutions to the problem were presented after it was clearly recognized that, at least in principle, psychological integrity is a value which also merits recognition and protection. These solutions, discussed at length in Working Paper 43, have been submitted to jurists, mental health professionals and the public for consideration.

The Commission has consulted widely on this issue, and the following is a summary of its findings and conclusions.

First, a large majority recognized the necessity in modern times of using the criminal law to protect respect for psychological integrity. Secondly, a large number of the jurists consulted, especially practising lawyers, considered that the evidentiary problems referred to by the Commission in Working Paper 43 are indeed real and would represent a major obstacle if the offences were to be framed along the lines of those already existing for violations of physical integrity. Finally, all those consulted agreed with the proposals contained in that Working Paper regarding the modernization of existing legislation.

The Commission therefore considers that the new Criminal Code should attempt to make some provision for protecting psychological integrity, but it realizes the very great problems involved in doing so. It is for this reason that the Commission has, for the time being, simply recommended the creation of an offence against psychological integrity limited to the treatment situation.

B. General Standards of Criminal Law

The *Criminal Code* recognizes a valid defence in questions involving medical treatment when, as section 45 provides, treatment is performed for the benefit of the individual, with reasonable care and skill, and it was reasonable to provide the treatment having regard to the state of health of the person and the other circumstances of the case.

To begin with, the criminal law regards treatment as an assault like any other. However, it is a very special type of assault, since legislation specifically creates an exemption from liability in view of the purpose of the treatment (the individual's welfare), its reasonableness and the means used to provide it.

As Working Paper 26 showed, the criminalization of an action involving a surgical procedure can only occur if there was an abuse, that is — to apply the idea underlying the present legislation — if the act taken as a whole was not "reasonable." In the Commission's view, this requirement should be maintained and the matter left to the courts to decide in each particular case.

The foregoing analysis applies only within the limits of actual treatment or therapy. Certain problems may arise in experimental situations, since the objective is not to provide an individual with a benefit as such, but simply to extend the area of scientific knowledge. Nonetheless, purely scientific experimentation on human beings is a widely accepted fact of modern life. It is a necessity in pharmacology and the development of new medicines. It has a socially valid and ethically legitimate purpose. Provided the person who is the subject of the experimentation gives valid consent, not obtained by mistake, fraud or violence, the first obstacle to its legality would appear to have been removed. As with treatment as such, moreover, the general provisions regarding offences against the person (homicide and criminal negligence) appear to be adequate to control possible abuses.

The Commission accordingly recommends, subject to the additional conditions stated below, that experimentation be subject to the same rules as treatment, in that the legality of the act will depend on obtaining free and informed consent to it.

A further problem presented by the general rule of "reasonableness" of the act was discussed at length in Working Paper 28 and in Report 20, both entitled *Euthanasia, Aiding Suicide and Cessation of Treatment*. It results from the combined effect of the provisions of *Criminal Code* sections 45 and 199. The latter, it will be recalled, requires anyone who undertakes medical treatment to continue providing it if failing to do so may threaten human life. Taken literally, and in the medical context, it amounts to a legislative endorsement of heroic and aggressive therapy. It would mean that a physician who has undertaken treatment cannot suspend it if doing so could result in the patient's death, even though the treatment has become useless and is only delaying eventual death. This provision was drafted at a time when extraordinary means of artificially prolonging human life did not yet exist. It is clearly no longer suited to the current situation, and taken literally, produces an effect diametrically opposed to that desired.

This extremely serious problem led the Commission to suggest a significant amendment to the present law in Report 20. This recommendation, drafted in keeping with the present *Criminal Code* provisions, and in the form of a legislative amendment, read as follows:

Nothing in sections 14, 45, 198, 199 and 229 shall be interpreted as requiring a physician

...

(*b*) to continue to administer or undertake medical treatment, when such treatment has become therapeutically useless in the circumstances and is not in the best interests of the person for whom it is intended.

The Commission repeats this proposal, the spirit and content of which should be embodied in the new Canadian Criminal Code in a new form. It accordingly suggests that the new Criminal Code contain a specific provision that, contrary to the general rule regarding crimes by omission, no one has a duty to continue medical treatment that is therapeutically useless or contrary to the wishes of the patient.

C. Palliative Care

It will be recalled that palliative care is care given to the patient not to cure his illness but solely to ease the physical and emotional suffering he experiences.

For some years palliative medicine has been making great strides in effectively controlling the pain suffered by terminal patients. This progress is an eloquent and humanitarian response to those who advocate active euthanasia to prevent patients from suffering. It should be continued and encouraged.

In palliative care the administration of drugs or pain-killers has a place which, though not unique, is essential. It is well known in pharmacology that at some point the administration of such substances creates a risk of shortening the patient's life expectancy. Though in such a case the act is clearly not committed for the purpose of causing death, the fact remains that it may be suspect from the standpoint of the criminal law because it has a causal relation to death.

In Report 20, the Commission, responding to the many representations made to it, suggested adoption of the following formulation, again within the framework of the existing *Criminal Code*:

> Nothing in sections 14, 45, 198, 199 and 229 shall be interpreted as preventing a physician from undertaking or obliging him to cease administering appropriate palliative care intended to eliminate or to relieve the suffering of a person, for the sole reason that such care or measures are likely to shorten the life expectancy of this person.

In the Commission's view, the gist of this amendment, designed to remove doubts concerning a matter of great importance, should also be included in the new Criminal Code. It might, for example, be the subject of a special provision inserted in the chapter dealing with the definition of crimes or offences.

II. Maintaining the Principle of Autonomy

The principle of autonomy of the person has been defined, described and discussed many times in Papers published by the Commission. There is thus no need to cover the same ground again here. However, its impact on the criminal law needs to be

examined in greater detail. The following comments do not apply to medical law only: they have a more general scope covering offences against the person. For clarity in presentation we have chosen to group our findings under two main headings: first, the role of consent, and second, the protection of incompetent persons.

A. The Role of Consent

In a Study Paper published in 1980, the Commission examined in detail the problems raised for current positive law by consent to medical treatment.

In classical theory there is, in principle, no assault if the "victim" consents to the force used against him and if the purpose of using such force is not in itself illegal or immoral. To take an everyday example, a boxer, by the very nature of the sport he engages in, consents to receive normal and usual blows in the process. In general, therefore, consent has the effect of legalizing a violation of bodily integrity which, in other circumstances, without such consent, would constitute a criminal offence. Two questions arise as a result.

First, the consent given must be valid. The law cannot look only at the formal aspect of the expression of consent in determining its legal validity. Someone who acquiesces in an assault on his person because he is threatened with death has expressed consent, but has not validly consented in the eyes of the law. A consent extorted by duress is not valid and so cannot legalize the assault.

The same is true of consent given by the victim as the result of a mistake or fraud. Such situations are well known in the private law of contract, and are referred to as defects in consent. This must also be the case in the criminal law.

In light of this, the Commission considers that the new Code should contain fundamental rules regarding consent, specifying the cases in which the victim's consent may be regarded as a valid defence to the charge and providing that, despite a formal expression of consent, there cannot be a valid consent if it was obtained by mistake or fraud or is the result of duress.

The second question is more complex. It will be examined by the Commission in its Working Paper on experimentation. The problem is not limited to this type of action, though in practice it is usually encountered in this connection. If it is assumed that a competent person can validly consent to an invasion of his physical integrity, does this mean that the mere fact of consent constitutes a valid defence in all cases? The situation may be illustrated by an example. Assume that someone of legal age, of sound mind and in full possession of the facts, consents to become the subject of a scientifically useless experiment which, though presenting no danger of death, may nevertheless have serious consequences. A person consents, for example, to demonstrate the effectiveness of a new surgical instrument, by having a healthy finger amputated. Assume, to take

another example, that in its initiation rites a sect requires its future members to amputate a leg, and the new candidate freely consents to do this and finds a surgeon willing to conduct the operation. In such cases, should not the criminal law in the name of public order retain the right to intervene, despite the consent, and to criminalize the act in question?

As Working Paper 28 indicated, whereas the traditional common law prohibits consent to death or the infliction of grievous bodily harm, the Canadian *Criminal Code* in section 14 limits the scope of the rule to consents to death.

The Commission feels that society must, through the courts, retain some power of control over the acts which it may regard as "humanly unacceptable" at a particular stage of its development.

Two solutions are therefore possible. The first involves enacting a specific offence, or inserting in a general offence on consent a provision, stating that consent may not be validly given if the purpose of the assault is itself immoral or unacceptable. This is the approach taken, for example, by paragraph 226(a) of the Penal Code of the Federal Republic of Germany, which provides:

> Anyone who inflicts a bodily injury with the consent of the injured person commits an unlawful act only if such deed violates basic morality.

The problem with this first solution is the fact that it draws a very general line and does not make it possible to foresee judicial solutions with any accuracy. The second solution, which the Commission prefers, is simply to go back to the old common law rule, followed by Canadian courts, that consent cannot be validly given if the assault, when not justified for therapeutic reasons, may create a serious danger to the person's life or health. If the bodily harm is minor and the individual consents to it, the criminal law should not prohibit it. The power of the courts to intervene should be reserved for cases in which the person has to be protected, despite himself, against a serious attack on his health or integrity.

B. The Protection of Incompetent Persons

The incompetent person, that is, someone who cannot give valid consent, may become an easy target for all kinds of abuse involving violation of personal integrity. This is why from time immemorial the law has provided special protection for such persons.

The problem of protecting incompetent persons has been considered by the Commission several times since 1972. In some recent studies the inability to consent and its effects, as well as methods of protecting fundamental rights, have been analysed in connection with: contraceptive sterilization operations (by Working Paper 24); cessation of treatment (by Working Paper 28 and Report 20); behaviour alteration (by Working Paper 43); and also more indirectly, medical treatment (by Working Paper 26).

It appears from all the discussions, comment and observations on these various provisions and those published by the Commission earlier, that preservation of the principle of autonomy of the person necessarily requires that the measures to protect the rights of an incompetent person should be strengthened. By definition, an incompetent person is someone who no longer functions autonomously. Society must therefore seek to promote those persons' recovery and the law must provide them with special protection. In this connection the reader can refer to Working Paper 24 on sterilization. This Paper has been used as a model in many provincial legislative initiatives on the subject, at least as regards general principles. The Commission does not intend to further its research on that issue or to submit a Report to Parliament. In the present state of the law, in view of the progress already made, it feels this would not be useful, especially since the civil rules for protecting the mentally handicapped do not necessarily belong in the *Criminal Code*.

In the criminal law, the requirement that consent be free and informed in order to legalize an invasion of the integrity of the person provides some initial protection. However, as we have seen, this is not sufficient. As the Commission has pointed out on several occasions, the progress of psychiatry and the changes in attitude toward mental illness mean that it is increasingly necessary to separate incapacity in the legal sense from factual inability to give consent. In the case of decisions regarding a person's own body, medical procedures and decisions affecting life and its continuance, the fact that he has been declared incompetent by a court does not mean that his consent or assent may automatically be dispensed with. In other words, for the purposes of the criminal law a person whom the criminal law has declared incompetent should, like anyone else, have the right to participate in decisions concerning himself when those decisions involve a violation of his integrity, provided he is able, despite the illness affecting him, to understand the nature and consequences of his actions. Most current or proposed provincial legislation has adopted this general concept.

However, this rule has to be qualified. As the Commission has observed, where treatment is concerned, a hospital or physician must retain the right to treat a person without his consent in an emergency situation and where inaction may be dangerous to the life or safety of the person or his surroundings. These are the classical exceptions which require no further elaboration.

Finally, though the mentally ill or handicapped person, like anyone in Canadian society, benefits from the general protections provided by law, such as the Charter and other fundamental legislation, he must still be given specific protection to shield him from abuses. As the Commission has mentioned several times, it should not be possible to deprive anyone of the exercise of certain of his rights without a valid decision either by a court of law or by a quasi-judicial tribunal. Moreover, a mentally handicapped person should benefit from all the fundamental procedural guarantees against unlawful confinement. These requirements are in fact applied in the great majority of existing federal and provincial enactments on the question.

Civil protection for incompetent persons is primarily, though not exclusively, a matter for provincial law. There is, however, a new aspect to such protection with the coming into force of the federal Charter, many of the provisions of which will undoubtedly have a direct bearing on the matter. As the Commission indicated in Working

Paper 43 regarding behaviour control and alteration, it is discouraging to find a lack of uniformity in provincial legislation on such an essential matter as the rights and legal treatment of the mentally handicapped. The Commission accordingly repeats its recommendation, made at that time, that a special effort should be made through bodies such as the Uniform Law Conference to adapt existing legislation to the rights conferred by the Charter and, when possible, to standardize the various provisions regarding the protection of incompetent persons.

III. Maintaining the Principle of Self-Determination

One of the direct consequences of the principle of personal autonomy is the right to what may be referred to as *self-determination*. Once a person is capable of making free and informed decisions, he should have the right, without interference and within the limits imposed by his living in society, to make decisions affecting himself. This rule of self-determination is particularly important where decisions affect physical or mental integrity. It is designed to respect the individual's decision-making power, to ensure a personal "sphere of intimacy" and to guarantee the individual a measure of control over his own life.

In Working Paper 28 and Report 20 the Commission examined, in relation to the criminal law, the consequences of applying this principle to standard violations of the physical integrity of the person. The present situation and the suggestions for reform made at that time may thus be briefly reviewed here.

A. Cessation of Treatment

Treatment of a competent person is a voluntary act. Because he is autonomous, he has the power to decide to start or stop it. The matter becomes serious when the cessation or non-initiation of treatment at the request of the person concerned may have the effect of causing or hastening his death.

As it has said several times, the Commission considers that the law should observe the principle of self-determination by the individual over his own body, over his own life and death. This necessarily means that an individual may refuse treatment or have it stopped, even if doing so places his life in jeopardy. This is true, for example, of a Jehovah's Witness who refuses a blood transfusion or a patient suffering from a serious illness who desires to end treatment or to stop intravenous feeding. It is clearly important to ensure that the decision is that of a lucid person who is capable of making it. If this condition is met, the Commission considers that the decision should be carried out even though to an impartial observer it may not appear to be objectively valid. The individual's personal reasons, whether or not shared by others or by society, should be respected, whatever one's opinion of their logic, relevance or validity.

The Commission therefore considers that in the new Criminal Code, the competent person's right to self-determination over his own body and the right to make unaided decisions affecting himself should be formally recognized and stated. This right is a general one which not only has medical ramifications but also applies to any circumstances in which a violation of the integrity of the person may take place.

B. Active Euthanasia

The Commission has strongly rejected active euthanasia and continues to do so. As it wrote in Report 20, the act of active euthanasia, sometimes known as mercy killing, should continue to be treated as murder by the law.

Observance of the principle of self-determination does not imply that the individual has the right to require others to put him to death. Active euthanasia, even with the consent of the person concerned, is unacceptable. Its legalization or direct or indirect recognition by the criminal law is dangerous because it may lead to serious abuses. It could only result in a significant reduction of the area of protection provided by the criminal law for the integrity of the person.

There does not seem to be any need to review here the argument developed at some length on this subject by the Commission in Working Paper 28 and Report 20. Our position remains one of firm opposition to the legalization or decriminalization of active euthanasia in any form, or any special legislative treatment for mercy killing.

C. Aiding Suicide

Finally, the principle of self-determination implies that a competent person is free to attempt to end his life by an act which is nevertheless objectionable in social and human terms. The decriminalization of attempted suicide, in 1973, did not have the effect of legitimizing suicide or of creating a true "right" to suicide in the classical sense of that word. The Commission feels that suicide remains an act which is fundamentally contrary to human nature. However, it agrees that for humanitarian reasons the attempt should be decriminalized.

In 1973, Parliament retained aiding suicide as an offence. This move has recently been criticized by several groups, especially in view of the assistance provided to the terminally ill. In Working Paper 28 and Report 20, the Commission stated its opposition to the decriminalization of aiding suicide on the ground that the principle of self-determination should not confer a right on a third party to aid or abet a person to commit the act. Further, in terms of general legislative policy, decriminalizing the aiding or abetting of suicide is dangerous because of the abuses that will necessarily result from such a policy. It has to be borne in mind that aiding suicide will not occur only in cases of terminally ill patients, with whom in human terms one can only sympathize.

The Commission therefore considers that the new Criminal Code should continue to prohibit aiding suicide as one of the offences against the integrity of the person.

CHAPTER TWO

Proposals for Reform

As we mentioned at the beginning of this Report, law reform in keeping with the Commission's mandate can be achieved in several ways. First, it may be through amendments to existing legislation or by the creation of new legislation, as part of the adoption of a modern Criminal Code. Second, it may be by adopting proposals not necessarily intended for legislative enactment. Finally, it may be by means of recommendations on legal policy in the widest sense, indicating to the government, Parliament or the proper authorities the general approach that should be taken on a particular question.

These three methods have been used throughout the studies published by the Commission since the early seventies. In determining their final form, especially those in the first category, the Commission has to take into account that it is at present devoting most of its energies to the drafting of a new Criminal Code. Legislative reforms already proposed will therefore now have to be examined in terms of their inclusion in this new document.

The final form of this new Criminal Code and its internal structure have not yet been decided. It is therefore difficult for the Commission to present its proposals in the form of a final legislative provision. For this reason it has preferred, in what follows, to give as complete a list as possible of the content which such new rules should have, without concerning itself with their final form for the time being.

For the sake of clarity, these recommendations have been combined under two headings, those to be contained in legislation within a new Criminal Code and those which fall more into the category of recommendations on general legal policy.

1. Recommended Legislative Amendments

Some form of regulation of medical treatment within the *Criminal Code* is essential. This is implicit in the existing legislation, as the provisions of sections 19, 45 and 198 on the one hand legalize what would otherwise fall under the heading of assault, and on the other set out the general criteria governing the legality of this type of procedure.

The final form which the regulation of medical treatment may take in the new Canadian Criminal Code is still to be determined. It will probably only be settled once the substance and form of other provisions governing offences against the person are determined.

Our first recommendation for legislation is therefore general in nature:

1. That all the offences against the person currently contained in the *Criminal Code* be retained, subject to the necessary technical modifications of substance and form, and that provision be made for redefining the rules regarding medical treatment.

Second, and in order of generality, there is the question of the legal recognition of the protection of psychological integrity. In keeping with the position taken by the Commission in the preceding discussion, its second recommendation is as follows:

2. In a treatment situation, the fact of causing serious psychological injury should constitute an offence. The possibility of extending the scope of this offence should be considered.

Third, the new Criminal Code should attempt to achieve greater clarity as regards consent, and in particular as to the legal effect of consent by the "victim" to a violation of the integrity of his person. To achieve this objective the Commission makes the following recommendations:

3. That except in emergency cases, the patient's consent be a prerequisite to the legality of medical treatment. Where the patient is unable to communicate, the consent of a third party as defined by provincial law should be obtained.

4. That the patient's consent be a prerequisite to the legality of human experimentation. Further, the risk incurred should not be out of proportion to the benefit that may be expected and should not constitute a serious threat to the person's life or health.

5. That consent may only be regarded as valid if it is free and informed, the exact meaning of these concepts to be determined by the courts in each particular case.

The Commission considers that the current standards for penalties relating to medical treatment are adequate and should be retained. Accordingly, the criminal law should not be concerned with slight fault or negligence in the administration of medical or surgical treatment. The Commission therefore recommends:

6. That, in general, the existing rules on the reasonableness of medical procedures and the standard required for penalizing abuses be maintained.

As the Commission has already twice suggested, it seems important at the present time for medical treatment to be recognized as *prima facie* legal, in contrast to other standard violations of personal integrity. For this reason it recommends:

7. That the new legislation on the subject be drafted so as to separate medical treatment from other forms of violation of the integrity of the person and to recognize that the former is *prima facie* legal.

The new protection given to human rights by the Charter means that they are now more secure than they used to be. However, in some special cases the law should provide additional protection. As we have seen in all cases, a strict interpretation of present legislation leads to endorsing and actually prescribing heroic or aggressive therapy. This practice is objectionable because it is directly contrary to the principles of the autonomy of the person and his right to self-determination, and because it is in itself a violation of the patient's fundamental rights. Though the general rule should continue to be that treatment given against the patient's wishes is an assault, the Commission feels that the problem is too important for proper conduct in this regard to be determined only by deduction from a general provision. The Commission therefore recommends:

8. That the ambiguity created by the provisions of section 199 of the present *Criminal Code* be resolved, and that the *Criminal Code* provide for the right of any competent person to refuse medical treatment or to ask for its suspension or termination, and that therefore no one shall be required to provide it against the patient's wishes.

Where a person who is unconscious, too young or not of sound mind is incapable of giving valid consent, the practice of providing heroic or aggressive therapy already prohibited in ordinary situations should not be allowed. The Commission therefore recommends:

9. That whether in the case of an incompetent or a competent person, a physician cannot be held criminally liable if he decides to suspend or not to commence treatment which has no further therapeutic value and is not in the patient's best interests.

Also with regard to medical treatment, the Commission feels it is essential for the *Criminal Code* expressly to favour the administration of palliative care, even where this may risk shortening the patient's life expectancy. This is simply a matter of recognizing a humane and accepted medical practice, and of ensuring that terminally ill patients are not deprived for some obscure legal reason of the palliative care to which they are entitled. Palliative care should, of course, always be administered in accordance with the rules ordinarily applicable to consent. (See Recommendation 3, *supra*.) The Commission therefore recommends:

10. That there be a provision in the *Criminal Code* stating that the administration of palliative care is not subject to any legal penalty when it is done for the person's benefit, even if it has the effect of reducing his life expectancy.

In Report 20, the Commission categorically rejected any loosening of the existing criminal law rules regarding active euthanasia, whether in the definition of the offence or in sentencing. For the reasons already stated, the Commission recommends:

11. That active euthanasia be neither legalized nor decriminalized and continue to be treated as culpable homicide both in terms of substance and sentencing, even if the act of homicide is committed for humanitarian reasons.

Finally, the Commission has indicated its opposition to decriminalizing the aiding and abetting of suicide. It therefore recommends:

12. That aiding and abetting of suicide not be decriminalized and continue to be penalized in the new Criminal Code.

II. Recommendations on General Legal Policy

In a separate Working Paper not yet completed, we are examining the standards which should apply to cases of experimentation on human subjects. The Commission has found that no specific rules exist in Canada applicable to those who use human beings as subjects of experimentation. Ethical rules certainly exist in various grant-aided or university bodies. Similarly, the Ontario Law Reform Commission recently suggested a specific guideline regarding experimentation on the foetus. However, we are currently considering whether these should be standardized, grouped in a single unit, whether exceptions or prohibitions regarding certain more vulnerable groups (prisoners, foetuses, children, the mentally handicapped and so on) should be rationalized and a procedure created for overseeing the application of these standards.

Two principal recommendations made directly or indirectly in the various Papers mentioned above must be clarified here.

Our first general recommendation concerns the protection of the mentally incompetent. The Commission has found that there are sometimes considerable differences among the provisions to protect them in the various Canadian provinces. As it means protecting truly fundamental rights, and in view of the provisions of the Charter, the Commission recommends:

13. That a special effort be made through bodies such as the Uniform Law Conference, first, to bring existing legislation more in line with the rights recognized by the Charter, and second, to standardize, where possible, the various statutes affecting the administration and refusal of treatment and the protection of the fundamental rights of the mentally incompetent.

Our second general recommendation is as follows: the Commission has had occasion to mention how firmly it rejects the idea that treatment may be used as a form of criminal penalty. It also recognizes that, from the mere fact of being confined, a prisoner is subject to psychological pressure which makes him more vulnerable than others to certain abuses. The Commission therefore recommends:

14. That the proper authorities ensure that medical procedures in prisons are controlled so that they are in keeping with the applicable principles of Canadian law. Such control should deal with the following problems, among others: obtaining the prisoner's consent; a mechanism to ensure that participation is voluntary; and minimum standards for disclosure and consent.

Finally, the Commission has conducted extensive studies, published in 1979 and 1981 in the form of a Working Paper and a Report to Parliament respectively, on the criteria for the determination of death. This provision, which it continues to recommend strongly be adopted by Parliament, should be general in application. It should therefore not be included in the new Criminal Code, but in special legislation or — the solution favoured by the Commission — in the *Interpretation Act*. The Commission therefore recommends:

15. That the provision proposed in Report 15 on the determination of cerebral death be adopted by Parliament as an addition to the *Interpretation Act*.

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
K1A 0L6

or

Suite 310
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J31-48/1986
ISBN 0-662-54379-3

REPORT

ON

SOME ASPECTS
OF MEDICAL TREATMENT
AND CRIMINAL LAW